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No. 1105

In the Supreme Court of the United States

OCTOBER TERM, 1967

ARTHUR DELLA ROCCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on four counts charging violations of the transfer and making provisions of the National Firearms Act (26 U.S.C. 5811, 5814, 5821). The court of appeals affirmed (Pet. App. A).

Petitioner presents three questions for review in this Court. In substance, he contends that (1) in light of this Court's decision in *Haynes* v. *United States*, No. 236, this Term, decided January 29, 1968, his convictions are barred by the Fifth Amendment's privilege against self-incrimination, (2) the government's introduction at trial of testimony he gave in

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support of a pre-trial motion to suppress evidence violated his Fifth Amendment right not to incriminate himself, and (3) the delay in bringing him to trial violated his Sixth Amendment right to a speedy trial.

It is our view that petitioner has not demonstrated that he is clearly entitled to prevail on his constitutional contentions. *Haynes* v. *United States, supra,* decided only "that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under § 5841 or for possession of an unregistered firearm under § 5851." Different considerations may well be applicable in assaying the relevance of the Fifth Amendment to convictions for violations of the transfer and making provisions of the statute such as are involved here. Similarly, this Court's recent decision in *Simmons* v. *United States,* No. 55, this Term, decided March 18, 1968, does not necessarily control petitioner's claim that his earlier testimony was improperly introduced by the government at trial. Unlike the situation in *Simmons,* petitioner here took the stand at trial and testified regarding the matters to which his earlier testimony had related, and petitioner's counsel did not object to the specific testimony read into evidence, which in substance was cumulative and thus at least arguably not prejudicial. With regard to denial of the speedy trial claim, petitioner cites no authority to support the proposition that such a denial results where a defendant has acquiesced in the delay, was not incarcerated during the period, and can show no significant prej-

udice resulting from the delay—in spite of its substantial duration.

We do not urge, however, that petitioner's claims are insubstantial. Accordingly, we would indicate our acquiescence to the granting of certiorari were that the only feasible course which might be followed here. Since, however, the court of appeals' decision was rendered prior to this Court's decisions in both *Haynes* and *Simmons,* it seems appropriate that the court below be afforded an opportunity to reconsider its decision in light of those intervening holdings. Accordingly, without conceding the validity of petitioner's contentions, we respectfully suggest that this Court grant the petition for certiorari, vacate the judgment below, and remand the entire cause to the court of appeals for further consideration in light of the decisions in *Haynes* and *Simmons.*

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

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